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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

PERRY EDWARD WOOLRIDGE - - Petitioner

versus

HONORABLE RICHARD A. REVELL,
COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
AND APPENDIX

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QUESTIONS PRESENTED

1. Was the Petitioner denied due process of law by the Sixth Circuit's holding that he waived his right to complain of the highly prejudicial testimony elicited by the Commonwealth Attorney concerning his post-*Miranda* silence.

2. Was the Petitioner denied due process of law by the introduction of false evidence, namely, that the Petitioner and the deceased were partners in business.

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No. _____

PERRY EDWARD WOOLRIDGE - - - *Petitioner*

v.

HONORABLE RICHARD A. REVELL,
COMMONWEALTH OF KENTUCKY - *Respondent*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
AND APPENDIX**

The Petitioner, PERRY EDWARD WOOLRIDGE, respectfully prays that a writ of certiorari be issued to review the order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 20, 1982, reversing the decision of the United States District Court for the Western District of Kentucky granting Petitioner's Writ of Habeas Corpus.

OPINIONS BELOW

The judgment and memorandum opinion of the United States District Court for the Western District of Kentucky was entered and filed on March 31, 1982, granting Petitioner's Writ of Habeas Corpus and appears in the Appendix hereto. The order of the United States Court of Appeals, reversing the order of the District Court, was entered and filed on December 20,

1982, and appears in the Appendix attached hereto. The order of the United States Court of Appeals overruling Petitioner's Petition for Rehearing En Banc was entered and filed on the 8th day of February, 1983, and appears in the Appendix hereto.

JURISDICTION

The order of the Court of Appeals for the Sixth Circuit reversing the District Court's grant of the Petitioner's Writ of Habeas Corpus was entered and filed on December 20, 1982. A timely Petition for Rehearing and suggestion for rehearing en banc was denied on the 8th day of February, 1983, and this Petition for Certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under the provisions of Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions:

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

No person shall be . . . deprived of life, liberty, or property, without due process of law. . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

state deprive any person of life, liberty, or property without due process of law . . .

STATEMENT OF THE CASE

This case was tried by a jury of the Jefferson Circuit Court on January 9th and 10th, 1980. The Petitioner was charged in a one count indictment with the crime of murder.

The prosecuting attorney, during his closing argument, breached his duty as an officer of the court and denied the Petitioner due process of law by presenting the jury with facts not contained in the record, namely, imparting to the jury that the deceased and the Petitioner were partners in business.

The Petitioner was also denied a fair and impartial trial and his right to due process of law when the prosecuting attorney elicited testimony in the Commonwealth's case in chief and on cross-examination of the Petitioner himself, concerning the Petitioner's refusal to answer questions concerning his private business practices while under police custodial interrogation. The jury returned a verdict of guilty and sentenced the Petitioner to twenty years in the penitentiary. The Petitioner perfected a timely appeal to the Supreme Court of Kentucky. On the 10th day of March, 1981, that Court rendered an unpublished opinion which affirmed the Petitioner's conviction. In regards to the prosecutor's comments about the Petitioner's post-*Miranda* silence, the Supreme Court of Kentucky held that once the Petitioner chose to make a statement in which he had admitted shooting the

deceased, that he could not choose to answer questions about collateral matters under the rationale of *Doyle v. Ohio*, 426 U. S. 610 (1976). The Supreme Court of Kentucky dismissed Petitioner's arguments on cumulative effect and prosecutorial misconduct.

The Petitioner then sought a writ of certiorari in this Court. His application was denied and a timely Petition for Rehearing was filed. The Petition for Rehearing was denied by this Court on November 30, 1981.

The Petitioner then filed a Writ of Habeas Corpus in the United States District Court for the Western District of Kentucky. In a memorandum opinion issued on March 31, 1982, Hon. Judge Allen granted the Petitioner's Writ of Habeas Corpus and ordered that the Petitioner be given a new trial within ninety days after the entry of the judgment or the indictment against the Petitioner should be dismissed.

The District Court pointed out that Petitioner's constitutional rights under the holdings of *Doyle v. Ohio*, 426 U. S. 610 (1976), *Miranda v. Arizona*, 384 U. S. 436 (1966) and *United States v. Williams*, 665 F. 2d 107 (6th Cir., 1981) were violated.

While the Respondent contends that the evidence concerning Petitioner's post-*Miranda* warnings silence was collateral, the contention is belied by the attempt in the closing argument of the prosecuting attorney who, although he did not refer to the silence of the Petitioner as such, attempted to stress economic motives for the killing of Bill Olive. When that conduct is considered

in connection with the introduction of the evidence of Petitioner's refusal to answer questions concerning his business relationships with Olive by two different witnesses, and when one of these witnesses referred to the silence of the Petitioner in response to a question concerning whether he had any illegal business being run in the back, the court reaches the conclusion that Petitioner's constitutional rights under the holdings in *Doyle v. Ohio, supra*, and *United States v. Williams, supra*, were violated to such an extent that he is entitled to issuance of the writ and a new trial to be assigned within ninety days after entry of this judgment. [Appendix A, pp. 29-30.]

The Respondent then appealed to the United States Court of Appeals for the Sixth Circuit. In an opinion entered on December 20, 1982, that Court reversed the District Court and held that the "Defendant's failure to raise objection at trial, and his actual participation in the admission of the tape recording and transcript of his statement, constitute a waiver of his right to object to the admission of any corroborating testimony concerning his refusal to answer questions about his business relationship with the deceased." [Appendix B, p. 38.] Furthermore, the Court of Appeals held that "the use of the word 'partner' on one occasion during prosecution's closing argument does not amount to constitutional error." [Appendix B, p. 39.] Finally, the Court of Appeals noted that "as we have determined that the testimony of Detectives Johnson and Owen was properly admitted by the Trial Court, we

need not consider the question of cumulative effect. [Appendix B, p. 39.]

The Petitioner then filed a Petition for Rehearing En Banc which was denied on February 8, 1983.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Decided Important Questions of Federal Law in a Way in Conflict With Decisions of the Sixth Circuit and With Applicable Decisions of this Court.

The United States Court of Appeals for the Sixth Circuit decided important questions of federal law, that is, (i) the question of whether the Trial Court improperly allowed testimony concerning the Petitioner's post-*Miranda* silence, in a way in conflict with the decisions of this Court in *Doyle v. Ohio*, 426 U.S. 610 (1976) and a decision of the United States Court of Appeals for the Sixth Circuit, *United States v. Williams*, 665 F. 2d 107 (6th Cir., 1981).

During the Commonwealth's case in chief, the prosecuting attorney elicited testimony from Detective Johnson and Detective Owen concerning the Petitioner's refusal, during police custodial interrogation, to answer certain questions concerning his private business practices. Detective Johnson testified that when asked about his business relationship with the deceased, the Petitioner chose to remain silent.

Johnson: Upon completion of my scene investigation a morgue investigation and a report with a Coroner, I then returned to the Homicide Office and advised the suspect again of his Con-

stitutional Rights. I asked him what happened and he advised me that the victim, Mr. Olive, was breaking into the store and he had shot him. I asked him his business connection with Mr. Olive. *He stated he'd rather not say.* I asked him if there was any type of business being run in the back which was illegal. Why, he wouldn't say. [T.E. Vol. 1, pp. 36-37.]

Defense counsel properly objected to the Detectives' comments on the Petitioners silence, but the Trial Judge refused to sustain the objection or admonish the jury.

Mr. Curits: Objection to any references to his interrogation involving illegal activities of the store unless the Commonwealth is prepared to show that there were illegal activities, as it raises a false issue today, Judge.

Court: I thought he asked if there were any and he said there were not.

Mr. Curits: May the Jury be admonished, your Honor?

Court: There is nothing to admonish, is there?

Mr. Curits: Judge, show our objection to Detective Johnson's testimony. [T.E. Vol. I, p. 37]

On redirect examination of Detective Steve Owen, the Prosecutor again made reference to the Petitioner's silence in regards to questioning about his private business dealings.

Mr. Stewart: Mr. Owen, *did the tape not indicate that he refused to answer questions pertain-*

ing to the business relationship he had with the victim?

Mr. Owen: Yes, sir. He cooperated in everything but that. *He wouldn't say what relationship he had with Mr. Olive.*

Mr. Stewart: So, it would be more accurate to say that he cooperated in every extent except that which relates to the business relationship. It that correct?

Mr. Owen: Yes, sir. [T.E. Vol. III, p. 233]

Finally, on cross-examination of the Petitioner himself, the prosecuting attorney severely prejudiced the rights of the Petitioner when he once again asked Petitioner why he had refused to talk about his business relationship with the Detective.

Q: Once again, Mr. Woolridge, would you explain to me why you refused to talk about the business relationship with the Detective?

A: Number one, I think that's my own personal business about my liquor store. I was down there for murder, not to discuss my personal business about my store. So I asked—I answered all the questions, like I told you, and there was some personal business I had pertaining to my liquor store that I didn't seem that it was necessary to give the Officers that was questioning me. [T.E. Vol. III, p. 281-282.]

As the above testimony demonstrates, the jury was allowed to speculate as to the reason for the Petitioner's silence. The jury was allowed the opportunity to associate silence with guilt. In essence, the Petitioner was penalized for having exercised his Fifth Amend-

ment right to remain silent. Such a penalty cannot be tolerated.

This Court in the celebrated case of *Miranda v. Arizona*, 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) elaborated at length on the incriminating significance of a suspect's refusal to talk. In *Miranda*, this Court forbade the penalization of a Defendant for exercising his Fifth Amendment right to remain silent.

In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. *Miranda*, note 37, at p. 720.

Thus, the law is clear that it is impermissible to introduce evidence which shows that a criminal defendant stood mute or opted to remain silent while within police custody.

The logical nexus between a defendant's silence and his guilt is at best tenuous. In fact, this Court has determined such silence to be "insolubly ambiguous." *Doyle v. Ohio*, 426 U. S. 610, 49 L. Ed. 2d 91, 97, 96 S. Ct. 2240 (1976). There exists a variety of factors which might influence a suspect's decision to remain silent. For example, such a person might be troubled emotionally, such a person might have failed to understand the question presented to him, such a person might be unwilling to incriminate another, or such a person's silence might merely represent his response to a hostile or unfamiliar situation.

At the time of arrest and during custodial interrogation, innocent and guilty alike . . . may find the situation so intimidating that they choose to stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect may not have heard or fully understood the question, or he may have felt there was not need to reply. He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention. *United States v. Hale*, 422 U. S. 171, 45 L. Ed. 2d 99, 105, 95 S. Ct. 2133 (1975).

Despite the myriad of nonprejudicial reasons for which a suspect may choose to remain silent, this Court has recognized that it is the prejudicial reason to which the jury will assign more weight. As mentioned above, the prejudicial reason is that such a person has something to hide.

. . . evidence of silence . . . has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. *Doyle, Id.* at 107.

The District Court recognized the sound principles of *Doyle* and granted the Petitioner's Writ of Habeas Corpus. The District Court held that Petitioner's rights under *Doyle* and *United States v. Williams, supra*, were violated by the testimony which was elicited in the Commonwealth's case in chief concerning

the Petitioner's refusal to answer questions concerning his private business practices. The District Court based its holding on the testimony elicited during the government's case in chief without recognizing the damaging testimony elicited from the Petitioner himself on cross-examination.

While the respondent contends that the evidence concerning petitioner's post-*Miranda* warnings silence was collateral, the contention is belied by the attempts in the closing argument of the prosecuting attorney who, although he did not refer to the silence of the petitioner as such, attempted to stress economic motives for the killing of Bill Olive. When that conduct is considered in connection with the introduction of the evidence of petitioner's refusal to answer questions concerning his business relationships with Olive by two different witnesses, and when one of these witnesses referred to the silence of the petitioner in response to a question concerning whether he had any illegal business being run in the back, the Court reaches the conclusion that petitioner's constitutional rights under the holdings in *Doyle v. Ohio*, 426 U. S. 610 (1976), and *United States v. Williams*, 665 F. 2d 167 (6th Cir. 1981), were violated to such an extent that he is entitled to issuance of the writ and a new trial to be assigned within ninety (90) days after entry of this judgment. [Mem. Op. of D.C., Appendix A, pp. 29-30.]

The United States Court of Appeals for the Sixth Circuit reversed the District Court and held that the Petitioner's failure to properly object to the testimony

and his participation in the admission of his tape recorded statement constituted a waiver of his right to object to any testimony concerning his post-*Miranda* silence.

Petitioner argues that the above exchange constitutes a timely objection to the prosecutor's admission of testimony pertaining to Petitioner's post-*Miranda* silence when questioned about the business relationship with the deceased. This Court does not so interrupt the transcript. We read the objection to pertain to any mention of unsubstantiated accusations of illegal activity at the store. Accordingly, counsel for the Petitioner failed to raise timely objection to the testimony. [Appendix B, pp. 34-35.] Defendant's failure to raise objections at trial, and his actual participation in the admission of the tape recording and transcript of his statement, constitute a waiver of his right to object to the admission of any corroborating testimony concerning his refusal to answer questions about his business relationship with the deceased." [Appendix B, p. 38.]

Petitioner submits that he did, in fact, properly object to the admission of testimony concerning his post-*Miranda* silence. However, assuming arguendo that Petitioner did not object to said testimony, the decision of the Sixth Circuit is in contravention of its own decision in *United States v. Williams*.

In *Williams*, the Court held that the failure to object to testimony concerning the Defendant's post-

arrest silence was not fatal to the exercise of the right or its assertion on appeal.

The Sixth Circuit held that it was *plain error* for the trial court to allow testimony or introduce evidence during the governments case in chief, or during the defendant's cross-examination, that the defendant did not answer certain questions during investigatory interrogation. Such testimony violated that defendant's Fifth Amendment privilege against self-incrimination and his right to due process of law.

It was plain error in that it clearly violated *Williams'* privilege against self-incrimination when the F.B.I. agent was examined as to *Williams'* refusal to answer these questions. . . . In any case we conclude that the admission of this cross-examination was plain error under Rule 52B.

It was a violation of *Williams'* due process rights under the Fifth Amendment when he was cross-examined about his failure to answer these questions. This is true even if the cross-examination were limited to purposes of impeachment. *Doyle v. Ohio*, 426 U. S. 610 (1976). The rationale of *Doyle* is that it is fundamentally unfair except in special circumstances not present here, to cross-examine a defendant about post-*Miranda* silence because the *Miranda* warning implicitly assures silence will carry no penalty and also because silence after such a warning is "insolubly ambiguous". *Doyle*, at 617, 618. *Williams, Id.*, at 109-110.

The Sixth Circuit held that this was plain error even though defense counsel had failed to object to the testi-

mony and had been supplied a copy of the agent's report of the interview before the trial.

After the defendant in *Williams* took the stand and the prosecutor cross-examined him about the defendant's post-*Miranda* silence, defense counsel, at a conference at the bench, unsuccessfully requested the trial judge to instruct the jury that the defendant's refusal to answer questions was not evidence of his guilt or innocence. The Sixth Circuit held that while defense counsel's manner or formulation of raising the objection was unartful, that it fairly brought the question to the attention of the trial court.

After Williams took the stand, the prosecutor questioned him about, and bore in on, his refusal to tell the F.B.I. Agent how much and what manner he paid for the vehicle and from whom he purchased it. At this point, Williams' counsel, at a conference at the bench, unsuccessfully requested the trial judge to instruct the jury that his refusal to answer these questions at the interview was not evidence of his guilt or innocence. *While this formulation was unartful in raising the objection that the cross-examination was improper for all purposes including impeachment purposes it fairly brought this question to the attention of the trial court.* In any case, we conclude that the admission of this cross-examination was plain error under Rule 42(b). *Williams, Id.*, at p. 109.

As in *Williams*, the Petitioner submits that while defense counsel's objection to the testimony concerning Petitioner's post-*Miranda* silence may not have been

artfully formed, that it more than adequately informed the trial court of the nature of the objection and, hence, preserved the error for appeal.

Petitioner submits that the testimony elicited during the Commonwealth's case in chief and on cross-examination of the Petitioner himself, was plain error under *Doyle*, *Miranda*, and *United States v. Williams*. Therefore, Petitioner respectfully requests this Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit since said decision ignores the holdings of this Court in *Doyle* and *Miranda* and its own holding in *Williams*.

II. The Decision Below Conflicts With the Decisions of This Court in *Alcorta v. Texas*, 355 U. S. 28 (1957) and *Napue v. Illinois*, 360 U. S. 264 (1959).

The decision of the Court of Appeals for the Sixth Circuit is in conflict with the decisions of this Court in *Alcorta v. Texas*, 355 U. S. 28 (1957) and *Napue v. Illinois*, 360 U. S. 264 (1959) wherein this Court held that a conviction gained by testimony which gives the jury a false impression is obnoxious to the precepts of the Due Process Clause of the United States Constitution.

The United States Court of Appeals for the Sixth Circuit held that "the use of the word 'partner' on one occasion during the prosecution's closing argument does not amount to constitutional error." "Standing alone, the prosecutor's use of the word 'partner' during closing argument did not render the trial of the

Petitioner fundamentally unfair.” [Appendix B, pp. 38, 39.]

Petitioner submits that the use of the word “partner” presented a false issue to the jury which remained uncorrected by the Trial Court. Prior to the Commonwealth Attorney’s closing argument, all of the evidence adduced at trial established conclusively that the Petitioner was the sole owner of a business known as Perry’s Liquors, located at Twenty-sixth Street and Broadway in Louisville, Kentucky. The Petitioner testified upon direct examination that he had purchased the business in late 1976 or early 1977. ([T.E. Vol. III, p. 264.]

As a personal favor to the previous owner, the Petitioner agreed to allow the deceased to remain on a portion of the premises and sell beer, since it was the Petitioner’s intention to convert the bulk of the property into a liquor store. The Petitioner allowed the deceased to sell beer on the premises as long as he paid his rent pursuant to a “Gentlemen’s Agreement.” [T.E. Vol. III, pp. 264-265]

Detective Johnson of the Louisville Police Department stated that the police clearly knew, from talking to witnesses, that the deceased merely rented space from the Petitioner.

Johnson: He refused to decline any connection with business with the victim and *we know from the witnesses that the victim rented*—[T.E. Vol. I, p. 52]

Detective Pat Sowers further testified that James Woolridge, an employee of Perry' Liquors, had told him that the deceased leased the back of the building pursuant to a verbal agreement.

Mr. Stewart: Now, did he give you any information regarding the existence of a lock on the door?

Mr. Sowers: Yes, sir, he did.

Mr. Stewart: And what did he tell you at that time?

Mr. Sowers: *He stated that Bill Olive leased the back of the building but this was only a verbal agreement and that Perry had placed the lock on the Twenty-seventh Street side of the business so Bill Olive could not enter.* [T.E. Vol. III, p. 240]

James Lewis, an employee of the deceased, stated that the deceased had never owned any of the building located at Twenty-sixth Street and Broadway and that the decedent only had a lease agreement to sell beer on a portion of the premises.

Mr. Stewart: From your own personal knowledge, did Mr. Olive have his beer depot operating under another owner?

Mr. Lewis: *Well, as far as I know, I understood he had it leased.*

Mr. Stewart: From your own personal knowledge did he have a lease at the time Mr. Woolridge bought it?

Mr. Lewis: *Yes, he had that lease then.*

Mr. Stewart: And when did you start working for him, after the Defendant bought the building or before?

Mr. Lewis: I think I started afterwards.
[T.E. Vol. II, pp. 134-135]

The Petitioner's testimony clearly indicates a lessor-lessee relationship since it establishes that the deceased was one month behind in his rent.

Mr. Curtis: When was the last time Mr. Olive had paid that overhead?

Perry Woolridge: Approximately two months. It had elapsed two months. It was about two—I would say three months on the light and gas, *and as far as the rental fee he was just one month behind—I mean it was coming up. It should have been in, but the month before—he hadn't paid the month before that.* I was out of town a lot and usually the way he does it, he gives it to me. [T.E. Vol. III, p. 306]

The Petitioner submits that all of the above testimony can only indicate that the deceased merely rented space from the Petitioner. There is an absolute lack of evidence which would support a conclusion that the Petitioner and the deceased's relationship was something other than that of lessor and lessee.

However, in his closing argument, the Commonwealth's Attorney chose to ignore all of the above testimony and, instead, he created and presented his own version of the facts. The Prosecutor told the jury that the Petitioner had no right to put a lock on the door since he and the deceased were involved in a partnership agreement.

Mr. Stewart: It is well known that a man's word is his bond and that there was a Gentlemen's Agreement between the victim and the defendant regarding the business arrangement of the depot. What right did the defendant have to call a halt to the deal? It was a Gentlemen's Agreement, an agreement which is a mutual agreement which can only be broken by the mutual consents. A Gentlemen's Agreement. *What right, if any, did the defendant have to put a lock on the door of a business which is owned by his partner.* [T.E. Vol. IV, pp. 352-353]

Defense counsel properly objected and asked the Court to admonish the jury that the word "partnership" had never been mentioned in any of the testimony adduced at a trial. The Trial Court recognized the fact that there had been no testimony regarding partnerships but chose not to admonish the jury. [T.E. Vol. IV, p. 353] It was error in this instance for the Prosecutor to inject any mention of a partnership between Woolridge and Olive because he was keenly aware that such a partnership did not exist.

The only purpose served by the inclusion of such comment was to give the jury an unfair and untrue impression that the alleged "partnership" was the root of the problem between the actors in this incident. Such comment also planted in the minds of the jurors a false motive for the shooting and gave the jury the impression that the killing of the deceased was premeditated, which it was not.

It is an old and well-settled rule of law that a conviction gained by testimony which gives the jury a

false impression is obnoxious to the precepts of Due Process of Law. See *Alcorta v. Texas*, 355 U. S. 28, 2 L. Ed. 2d 9 (1957). The rule of *Alcorta* regarding the use of false evidence also applies where the state, although not soliciting false evidence, allows false evidence to go uncorrected when it appears.

First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. [Citations omitted.] The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. [Citations omitted.]

The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, *People v. Savvides*, 1 N. Y. 2d 554, 557, 154 N.Y.S. 2d 885, 887, 136 N. E. 2d 853, 854, 855.

"It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. *A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsi-*

bility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair." [Emphasis added.] *Napue v. Illinois*, 360 U. S. 264, 269, 270 (1959).

The violation of the rules of *Alcorta* and *Napue* in the instant case is clear. While numerous witnesses testified that the Petitioner and the decedent operated independent enterprises pursuant to a "Gentlemen's Agreement," the Prosecutor injected comments regarding the "partnership" of Petitioner Woolridge and Olive, comments that the Prosecutor knew were patently false and not based on the evidence presented. These improper comments indelibly placed in the minds of the jurors the inaccurate and unwarranted inference that the Petitioner had a motive for killing Bill Olive. In short, the prosecutor was attempting to show that the Petitioner stood in a position to enjoy financial gain from the death of the decedent through insurance proceeds or a complete takeover of the business as a result of the fictitious "partnership" status.

Petitioner submits that the magnitude of the due process violation in this case is much greater than the violations in *Alcorta* or *Napue*. In those cases, the witnesses were actually the perpetrators of false evidence while the Prosecutors simply acquiesced or neglected to correct such false testimony. In the instant case, witness after witness testified truthfully and ac-

curately as to the lessor-lessee relationship of the parties, yet the Prosecutor repeatedly injected comments as to the "partnership" of the parties. In essence, the false evidence originated from the Prosecutor and not the witness stand. Instead of relying on the facts contained in the record, the Prosecutor literally made up his own set of facts and argued them to the jury.

The District Court held that the Prosecuting Attorney's conduct, in stressing economic motives for the killing of the deceased, when considered in light of the highly prejudicial testimony concerning the Petitioner's post-*Miranda* silence about his business relationship with the deceased, amounts to a violation of Petitioner's constitutional rights.

While the respondent contends that the evidence concerning petitioner's post-*Miranda* warnings silence was collateral, *the contention is belied by the attempts in the closing argument of the prosecuting attorney who, although he did not refer to the silence of the petitioner as such, attempted to stress economic motives for the killing of Bill Olive*. When that conduct is considered in connection with the introduction of the evidence of petitioner's refusal to answer questions concerning his business relationships with Olive by two different witnesses, and when one of these witnesses referred to the silence of the petitioner in response to a question concerning whether he had any illegal business being run in the back, the Court reaches the conclusion that petitioner's constitutional rights under the holdings in *Doyle v.*

Ohio, 426 U. S. 610 (1976), and *United States v. Williams*, 665 F. 2d 167 (6th Cir. 1981), were violated to such an extent that he is entitled to issuance of the writ and a new trial to be assigned within ninety (90) days after entry of this judgment. [Mem. Op. of D.C., Appendix A, pp. 29-30.]

The Sixth Circuit reversed the District Court and held that "the use of the word 'partner' on one occasion during prosecution's closing argument does not amount to constitutional error." [Appendix B, p. 38.] The Sixth Circuit noted that the Trial Court failed to give an admonition but "in view of the Trial Court's statement that the relationship was not a partnership, any possible prejudice by use of the word was dissipated." [Appendix B, p. 39.]

Petitioner submits that the Trial Court's statement falls miserably short of the protection provided by the requested admonition. The Trial Court's statement did not adequately protect the Petitioner's rights since it did not instruct the jury to disregard the false fact that the Petitioner and the deceased were partners in business.

Furthermore, the word "partner" cannot be taken as standing alone in the context of the Petitioner's trial. When this highly prejudicial remark is considered in light of the fact that the Petitioner refused to answer questions concerning his business practices with deceased, it becomes clear that the use of the word "partnership" implanted in the minds of the jury a false motive for the shooting of the deceased, namely, that the Petitioner would have gained financially as

a result of the death of his partner. Thus, the Sixth Circuit's reversal of the District Court's grant of Petitioner's Writ of Habeas Corpus is in conflict with decisions of this Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the order of the United States Court of Appeals for the Sixth Circuit reversing the District Court's grant of Petitioner's Writ of Habeas Corpus.

Respectfully submitted,

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APPENDIX

APPENDIX A
IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
Civil Action No. C 81-0772 L (A)

PERRY EDWARD WOOLRIDGE - - - - *Petitioner,*

v.

HONORABLE RICHARD A. REVELL - - *Respondent.*

MEMORANDUM OPINION

This action is submitted to the Court upon the petitioner's motion for a writ of habeas corpus and upon the motion of the defendant to dismiss or in the alternative for summary judgment. Petitioner was found guilty by a jury at a trial conducted by the respondent, Circuit Judge Richard A. Revell, of first degree manslaughter and sentenced to 20 years in prison. The Supreme Court of Kentucky affirmed petitioner's conviction in March, 1981, and the Supreme Court of the United States subsequently denied certiorari and it is clear that petitioner has exhausted his state remedies.

The evidence produced at the trial reflected that petitioner had purchased a liquor supply depot known as "Perry's Liquors" in late 1976 or early 1977. As a personal favor to the previous owner, petitioner agreed to allow Bill Olive to remain on a portion of the premises and sell beer. The parties entered into an oral agreement

under which Olive paid a monthly rent and shared the utility costs. Petitioner reserved the right to terminate the agreement at any time.

Olive became delinquent in his rent payments and in payment of his share of the utility expenses. As a result, the petitioner, on March 3, 1979, decided to sever the agreement and came to the premises and put a lock on the door to the part of the business which was used by Olive. Petitioner and his employees began to take inventory of the stock in order to reimburse Olive for any property belonging to him. Olive then came to the premises, took a hammer and beat the lock off the door. Petitioner shot and killed Olive when Olive came toward him swinging the hammer.

Some sixteen witnesses testified in the case, and the tape recording of a conversation made by petitioner to the effect that he shot Olive when Olive attempted to hit him with a hammer was introduced.

Petitioner contends that three errors of constitutional magnitude were committed. His first argument is that he was deprived of due process when the jury returned to the courtroom after two hours and forty-five minutes of deliberations and advised the court that it had reached a verdict that the defendant should be charged on Instruction No. 2, manslaughter, for not less than 10 years nor more than 20 years. After receiving that advice, the respondent inquired of the Foreman of the Jury what the verdict was, and the Foreman responded in substance that they recommended the maximum. The court then commented that he had the information he needed to know, and the Foreman twice again stated that the verdict was a recommendation of 20 years.

The court was then presented with the written form of verdict: which stated in essence *that* the Jury found petitioner guilty and recommended punishment of not less than 10 nor more than 20 years. The court then instructed

the Foreman that the Jury should fill in a specific number of years, and when the Foreman responded that the number was 20, the court proceeded to poll the Jury and each member of the Jury responded that 20 years was the verdict. While this was taking place, the petitioner objected and moved to discharge the Jury.

This Court is unable to perceive any constitutional error or, in fact, any error made by the respondent in attempting to ascertain what the true verdict was. Actually, the action of the trial court simply made the verdict conform to the intention of the Jury. See *Mathis v. Commonwealth*, 447 S. W. 2d 641 (Ky. 1969). Petitioner has cited no authority which would lend any weight to his argument as to ground number one.

The second contention made is that the closing argument made by the prosecuting attorney deprived him of his constitutional rights to a fair, due process trial. Petitioner contends that the prosecutor's statement to the Jury in closing argument that Olive and petitioner were partners was so prejudicial that it amounted to constitutional error. Although the record reflects that Judge Revell was of the opinion that the comment was not based upon any evidence, he did not admonish the Jury not to consider the comment. We are of the opinion that this omission on his part would not of itself have made the trial of the defendant so lacking in fair play that it amounted to a constitutional deprivation of his rights to due process. However, we must consider the cumulative effect of this remark made by the prosecutor in conjunction with admission into evidence of the testimony of two detectives concerning the petitioner's refusal to answer certain questions pertaining to his business relations with Olive.

The evidence shows that the Commonwealth introduced into evidence, over the objections of the petitioner, the

testimony of Detective Johnson which was, in part, as follows:

“ . . . I asked him his business connection with Mr. Olive. He stated he'd rather not say. I asked him if there was any type of business being run in the back which was illegal. Why, he wouldn't say. He again stated. . . .” (Tr. Vol. 1, pp. 36-37).

When Detective Steve Owen was examined by the prosecutor upon redirect, he asked whether the tape recording which had been made of petitioner's conversation with the detectives indicated that petitioner refused to answer questions pertaining to the business relationships he had with the victim. Mr. Owen responded in the affirmative and stated that petitioner cooperated in everything but that, and stated “(h)e wouldn't say what relationship he had with Mr. Olive.”

On his closing argument, the prosecuting attorney argued at one point that Olive was trying to get in to a business which had been locked up by petitioner, which business was owned by him under a gentlemen's agreement. Tr. p. 346. That statement is somewhat ambiguous. He argued, on p. 351 of the transcript of evidence, quoting from Mr. James Woolridge, “It was well known that the defendant wanted to put Mr. Olive out of business.” He then made the remarks previously referred to, “What right, if any, did the defendant have to put a lock on the door of a business which is owned by his partner.” Tr. p. 353. After discussing it with Judge Revell, he did modify his argument to say that there was a gentlemen's agreement and that the victim was only trying to protect what was his. Tr. p. 354. Petitioner relies upon *Doyle v. Ohio*, 426 U. S. 610 (1976) and upon *United States v. Williams*, 665 F. 2d 107 (6th Cir. 1981)

Doyle holds that it is fundamentally unfair, except in special circumstances, to cross-examine a defendant about post-*Miranda* silence because the *Miranda* warning implicitly insures that silence will carry no penalty, and also because silence after such a warning is "insolubly ambiguous" See pp. 617, 618.

In *Doyle, supra*, the question as expounded by Mr. Justice Powell was whether an assistant prosecutor may seek to impeach a defendant's exculpatory story told for the first time at trial by cross-examining him about his failure to have told the story after receiving the *Miranda* warning at the time of his arrest.

In *Williams, supra*, Williams was convicted of causing the interstate transportation of a motor vehicle, knowing it was stolen, and receiving and concealing it in violation of 18 U.S.C. Secs. 2312 and 2313. After receiving *Miranda* warnings, Williams advised the FBI agent of certain facts concerning his relationship to the allegedly stolen vehicle, including the changing of certain parts of the vehicle and operating it with an improper license. He refused to disclose how much he paid for the truck or the manner of payment. The Government, on direct examination of the FBI agent, presented the evidence, both of Williams' statements and of his silence.

Upon Williams' taking the stand, the Government cross-examined him concerning his refusal to tell the FBI agent how much he paid for the vehicle and how he paid it and from whom he purchased it. The court held the examination, both on direct and cross-examination of the FBI agent, clearly violated Williams' Fifth Amendment rights, and also that Williams' cross-examination constituted a violation of the Fifth Amendment rights under the holding in *Doyle, supra*.

While the respondent contends that the evidence concerning petitioner's post-*Miranda* warnings silence was

collateral, the contention is belied by the attempts in the closing argument of the prosecuting attorney who, although he did not refer to the silence of the petitioner as such, attempted to stress economic motives for the killing of Bill Olive. When that conduct is considered in connection with the introduction of the evidence of petitioner's refusal to answer questions concerning his business relationships with Olive by two different witnesses, and when one of these witnesses referred to the silence of the petitioner in response to a question concerning whether he had any illegal business being run in the back, the Court reaches the conclusion that petitioner's constitutional rights under the holdings in *Doyle v. Ohio, supra*, and *United States v. Williams, supra*, were violated to such an extent that he is entitled to issuance of the writ and a new trial to be assigned within ninety (90) days after entry of this judgment.

These conclusions are reinforced by the fact that petitioner testified in his own behalf and, therefore, the question of his credibility was very important for the Jury to consider. Since he testified concerning the business relationships with Mr. Olive, the evidence which was erroneously admitted as to his silence concerning that business relationship may well have created some or much doubt in the minds of the Jury as to his credibility. Credibility was not collateral to the issues in the case, the principal issue, of course, being whether or not the petitioner acted in self-defense when he killed Olive.

A judgment in accordance with this opinion will be entered this day.

Dated 3-31-82

(s) Charles M. Allen
Charles M. Allen
Chief Judge

cc: Counsel of Record

cc: Counsel of Record

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 82-5350

PERRY EDWARD WOOLRIDGE, - - *Petitioner-Appellee,*

v.

HONORABLE RICHARD A. REVELL, - *Respondent-Appellant.*

ORDER—Filed Dec. 20, 1982

Before: KENNEDY and KRUPANSKY, Circuit Judges; and
FAIRCHILD,* Senior Circuit Judge.

Respondent appeals from a judgment of the United States District Court for the Western District of Kentucky granting petitioner a writ of habeas corpus. The District Court concluded that the cumulative effect of the prosecutor's misstatement of fact during closing argument and the eliciting of testimony concerning petitioner's post-*Miranda* silence rendered the trial fundamentally unfair. For the reasons set forth below, we reverse.

Prior to filing his habeas petition Woolridge exhausted his state court remedies; he was unsuccessful both in his appeal to the Supreme Court of Kentucky and his petition for writ of certiorari to the United States Supreme Court.

*The Honorable Thomas E. Fairchild, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

Woolridge's petition for writ of habeas corpus contested the constitutionality of his jury trial in the Jefferson (Ky.) Circuit Court which had concluded on February 12, 1980, with a conviction for first degree manslaughter and the imposition of a 20-year prison sentence. In a Judgment and Memorandum Opinion dated March 31, 1982, Chief Judge Charles M. Allen granted the petition, giving Woolridge the right to a new trial within ninety (90) days or dismissal of the indictment. The judgment was stayed pending this appeal.

Woolridge owned a former depot in Louisville, Kentucky in which he sold liquor. As an accommodation to the former owner, Woolridge agreed to allow the deceased, Willie P. Olive, to remain on a portion of the premises to sell beer. The relationship between Woolridge and Olive was based on a "Gentlemen's Agreement" which provided that Olive could sell beer on the premises so long as he paid rent and shared the utility expenses.

On May 3, 1979, Olive was a month behind in his rent and had not paid any utility bills for over two months. Woolridge called Olive to the premises and when Olive arrived he found that the door to 'his portion' of the store had been locked, and that Woolridge was conducting a stock inventory.

Olive grabbed a hammer and began hitting the lock. Woolridge called the police, took a pistol out of his desk, and approached Olive. Woolridge was accompanied by two men and a watchdog.

Woolridge pointed the gun at Olive and requested that he stop swinging the hammer. Olive, a man described as six feet tall, weighing 225 pounds and, yet, weakened by diabetes and arthritis, allegedly turned on Woolridge. Woolridge shot, fatally wounding Olive.

Woolridge was indicted for murder. He pled self-defense, and, as noted above, was convicted of first degree manslaughter.

At trial the prosecutor elicited testimony from two detectives regarding petitioner's voluntary statement in which, although answering all other questions, he declined to answer questions about his business relationship with the deceased. During closing argument, the prosecutor incorrectly characterized the relationship between Woolridge and the deceased as a partnership. The District Court granted the contested writ of habeas corpus, reasoning that the cumulative effect of these errors by the prosecution rendered the trial fundamentally unfair.

Respondent contends that petitioner waived his right to object to the admission of testimony establishing that during his voluntary statement to two detectives petitioner declined to answer certain questions about his business relationship with the deceased. After the fatal shooting, Woolridge gave a voluntary statement to the police which was knowingly tape recorded and later transcribed. Detective Johnson, one of the interrogating officers, was called upon at trial to testify about his participation in the investigation. He stated: (Ap. 78-79)

I asked him his business connection with Mr. Olive. He stated he'd rather not say. I asked him if there was any type of business being run in the back which was illegal. Why, he wouldn't say. He again stated—

Mr. Curits: Objection to any references to his interrogation involving illegal activities of the store unless the Commonwealth is prepared to show that there were illegal activities, as it raises a false issue today, Judge. (emphasis added)

Petitioner argues that the above exchange constitutes a timely objection to the prosecutor's admission of testimony

pertaining to petitioner's post-*Miranda* silence when questioned about his business relationship with the deceased. This Court does not so interpret the transcript. We read the objection to pertain to any mention of unsubstantiated accusations of illegal activity at the store. Accordingly, counsel for the petitioner failed to raise timely objection to the testimony. Our conclusion is supported by what transpired as the trial progressed. After Detective Johnson testified, the prosecutor played the tape recording of defendant's statement for the jury without objection. (Ap. 86-102). At the end of the tape, the prosecutor moved that the recording be offered into evidence. Defendant raised no objection.

Mr. Stewart: Your Honor, if I have not done so, I move that this recording be offered into evidence.

Court: Any objection:

Mr. Curits: None from the defendant at this time.
(Ap. 102-3)

The contents of the tape recording corroborated Detective Johnson's testimony. The tape presented three instances where the defendant declined to answer any questions raised about his business connection with Olive.

First, at Ap. 89:

Q: Okay. Mr. Woolridge before you continue, would you explain to me who Bill Olive is and what relation he is to you in the store?

A: Uh, at this present time, I would like to hold on to that question if possible.

Q: Sure go ahead.

Second, at Ap. 90:

Q: Is he [Olive] an employee or—

A: He helps at the store.

Q: Okay, do you pay him?

A: No.

Q: You don't pay him, he just helps out at the store?

A: He helps at the store.

Q: Does he have any connection with the business? Is he a partial owner or does he have any money invested or anything?

A: I'd rather hold on to that question please sir.

Q: Alright.

* * *

And Third, at Ap. 92:

Q: Okay, this was uh, this was in relation to his duties at the store?

A: Right.

Q: But you say, he wasn't a paid employee, he just helped out?

A: I'd rather hold on on that question.

Q: Alright that's fine.

* * *

After the tape recording of defendant's statement was played for the jury, the second investigating officer, Detective Owen, was subjected to cross-examination by counsel for the defendant.

Mr. Curtis: Detective Owen, as to the homicide that occurred on May 3, 1979, did not Mr. Woolridge fully cooperate with you during the course of that interview from about 8:30 in the morning until 10:30 that same morning?

Owen: Yes, sir, he did. (Ap. 103-4)

On redirect, the prosecutor sought to clarify the notion of "full" cooperation. Without objection the following questions were asked.

Mr. Stewart: Mr. Owen, did the tape not indicate that he refused to answer questions pertaining to the business relationship he had with the victim?

Owen: Yes, sir. He cooperated in everything but that. He wouldn't say what relationship he had with Mr. Olive.

Mr. Stewart: So, it would be more accurate to say that he cooperated in every extent except that which relates to the business relationship. Is that correct?

Owen: Yes, sir. (Ap. 104)

As Detective Owen's testimony came after admission of the tape recording; as it dealt with clarifying testimony elicited by defense counsel on direct examination; and as counsel for the defendant did not object to any statement made by Detective Owen, Detective Owen's testimony was proper.

Subsequent to the testimony of Detective Johnson, the playing of the tape recording of defendant's statement, and the testimony of Detective Owen, defendant joined the prosecution in admitting a transcript of his statement into evidence.

Mr. Stewart: (Pros.) Your Honor, I believe we've had a lot of testimony about this statement. I would ask that a copy of it be introduced into evidence.

Court: Any objections?

Mr. Curtis: (Defense) Not from the defendant. Judge, may the record reflect that the Jury will have the benefit of both the recorded statement showing the tone and intensity of cross examination as well as the transcribed document reflected.

Court: I think the statement has already been filed and made a part of the record.

Mr. Curtis: Judge, may that also be defendant's Exhibit number 2?

Court: Any objection to that, Mr. Stewart?

Mr. Stewart: No, sir. (Ap. 126)

Defendant's failure to raise objections at trial, and his actual participation in the admission of the tape recording and transcript of his statement, constitute a waiver of his right to object to the admission of any corroborating testimony concerning his refusal to answer questions about his business relationship with the deceased.

The use of the word "partner" on one occasion during prosecution's closing argument does not amount to constitutional error. The prosecutor argued:

It is well known that a man's word is his bond and that there was a Gentlemen's Agreement between the victim and the defendant regarding the business arrangement of the depot. What right did the defendant have to call a halt [sic] to the deal? It was a Gentlemen's Agreement, an agreement which is a mutual agreement which can only be broken by the mutual consents. A Gentlemen's Agreement. What right, if any, did the defendant have to put a lock on the door of a business which is owned by his *partner*. (Ap. 138-9, emphasis added).

Counsel for the defendant objected, asking that the jury be admonished. Although no admonition, as such, was given to the jury, in the course of his discussion with the prosecutor and counsel for the defendant, the trial judge stated in the presence of the jury that "[a]s a matter of law it was not a partnership from the testimony that was given."

We are guided by the test iterated in *United States v. Leon*, 534 F. 2d 667, 679 (6th Cir. 1976).

In every case, we consider the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they were isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proofs introduced to establish the guilt of the accused. *See, e.g., United States v. Bowen*, 500 F. 2d 41 (6th Cir. 1974), cert. denied, 419 U. S. 1003, 95 S. Ct. 322, 42 L. Ed. 2d 278 (1975)

Further, we must consider "whether the prosecutor's comments resulted in fundamental unfairness, not whether there was trial error." *Hayton v. Egeler*, 555 F. 2d 599, 604 (6th Cir.), cert. denied, 434 U. S. 973 (1977), citing *Donnelly v. DeChristoforo*, 416 U. S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); *Burks v. Egeler*, 512 F. 2d 221 (6th Cir. 1975); *Gemmel v. Buchkoe*, 358 F. 2d 338 (6th Cir. 1966). Standing alone, the prosecutor's use of the word "partner" during closing argument did not render the trial of the petitioner fundamentally unfair. In view of the trial court's statement that the relationship was not a partnership, any possible prejudice by use of the word was dissipated. As we have determined that the testimony of detectives Johnson and Owen was properly admitted by the trial court, we need not consider the question of cumulative effect.

The judgment of the District Court is reversed and the writ of habeas corpus is dismissed.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5350

PERRY EDWARD WOOLRIDGE, - - *Petitioner-Appellee,*

v.

HONORABLE RICHARD A. REVELL, - *Respondent-Appellant.*

ORDER—Filed February 8, 1983

Before: KENNEDY and KRUPANSKY, Circuit Judges; and
FAIRCHILD,* Senior Circuit Judge.

The Court not having favored rehearing *en banc* in the above case, the petition for rehearing is referred to our panel for consideration.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman/lb
Clerk

*Honorable Thomas E. Fairchild, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.